In the Supreme Court of the United States

OCTOBER TERM, 1964

No.

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

RAYMOND E. COOPER AND JUDY COOPER

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

BASCOM H. SMITH AND JUNE E. SMITH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in the above-entitled cases.

OPINIONS BELOW

The opinion of the Tax Court is reported at 39 T.C. 253. The opinion of the court of appeals (Appendix, pp. 5–6, *infra*) is reported at 330 F. 2d 163.

786-727—64

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1964 (p. 7, *infra*). By order of the Chief Justice, the time for petitioning for a writ of certiorari was extended to July 15, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether respondents, who mined coal under oral contracts with a lessee of mineral rights from whom they received a specified price per ton, were entitled to percentage depletion allowances on the amounts received from the lessee.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

> SEC. 613. PERCENTAGE DEPLETION.
>
> (a) *General Rule.*—In the case of the mines, wells, and other natural deposits listed in subsection (b), the allowance for depletion under section 611 shall be the percentage, specified in subsection (b), of the gross income from the property excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 percent of the taxpayer's taxable income from the property (computed without allowance for depletion). * * * In no case shall the allowance for depletion under section 611 be less than it would be if computed without reference to this section.
>
> * * * * * *

STATEMENT

As in *Paragon Jewel Coal Company, Inc.* v. *Commissioner*, No. 134, this Term, and *Commissioner* v. *Merritt*, No. 237, this Term, this case involves contract mine operators who entered into oral agreements with the holder of mineral leases on certain mining property. Under the terms of the agreement the contract miners—respondents in this Court—agreed to mine the coal and deliver it to the lessee (Jewell Ridge Coal Corp.) for a price to be established from time to time by the lessee. The Tax Court disallowed respondents' claimed percentage depletion allowances on the ground that they had not acquired an "economic interest" in the coal "in place." The Court of Appeals for the Fourth Circuit reversed the Tax Court on the basis of its opinion in the *Paragon* and *Merritt* cases, 330 F. 2d 161, decided the same day. Paragon has filed a petition for certiorari, and we have filed a protective petition on behalf of the Commissioner in the *Merritt* case. Nos. 134 and 237, this Term.

REASONS FOR GRANTING THE WRIT

If the petition for a writ of certiorari in No. 134 is granted and petitioner's contention in that case is sustained, the decision in this case—which turned on the fact that there was no relevant distinction between the present contract and that in *Paragon*—will have to be reversed. The present petition is therefore being filed in order to protect the government's interest, and it should be granted only if the Court grants

the petition for a writ of certiorari in *Paragon Jewel Coal Company, Inc.* v. *Commissioner*, No. 134, this Term.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
MELVA M. GRANEY,
MICHAEL MULRONEY,
Attorneys.

JULY 1964.

APPENDIX

In the United States Court of Appeals for the Fourth Circuit

No. 9213

RAYMOND E. COOPER AND JUDY COOPER, AND BASCOM H. SMITH AND JUNE E. SMITH, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS TO REVIEW THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

(Argued January 13, 1964. Decided March 17, 1964.)

Before HAYNSWORTH, BRYAN and J. SPENCER BELL, Circuit Judges.

John Y. Merrell for Petitioners, and Michael Mulroney, Attorney, Department of Justice, (Louis F. Oberdorfer, Assistant Attorney General, and Lee A. Jackson, Melva M. Graney and Earl J. Silbert, Attorneys, Department of Justice, on brief) for Respondent.

J. SPENCER BELL, Circuit Judge:

Petitioners contend that the Tax Court erred in denying them the percentage depletion deduction on

the amounts which they received for their coal. Petitioners are two of a large number of contract mine operators who entered into oral agreements with the Jewell Ridge Coal Corporation [hereinafter Jewell Ridge] sometime prior to 1953 to extract coal from that company's leased property. Their right to the deduction depends upon whether they acquired an economic interest in the coal in place, and this in turn depended upon the terms of their contracts with Jewell Ridge. Insofar as their right to take the percentage depletion deduction is concerned, the terms of petitioners' contracts are the same as those entered into by the contract mine operators in *Merritt* v. *Commissioner*, F. 2d (4 Cir. 1964), which was argued before this court on the same day as the case at bar. In that case, we decided that the contract mine operators were entitled to take the deduction. We have read the record in this case and find no basis for making a distinction. The basic historical facts found by the Tax Court insofar as they relate to the tax issue are the same.

We have concluded, therefore, that upon this record as a whole the court was clearly in error in finding that the petitioners had no economic interest in the coal in place and that their contracts were terminable at will by Jewell Ridge. We see nothing to be gained by a detailed repetition of the facts and the reasons underlying our decision in that case.

Our conviction is strengthened by the fact that the Tax Court itself in another case involving the same contract reached the same conclusion as we have in this and in the *Merritt case*. Norman E. Clifton, 27 P-H Tax Ct. Mem. 271 (1958).

The decisions of the Tax Court are

Reversed.

JUDGMENT

Filed and Entered, March 17, 1964

In the United States Court of Appeals for the Fourth Circuit

No. 9213

RAYMOND E. COOPER AND JUDY COOPER, AND BASCOM H. SMITH AND JUNE E. SMITH, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS TO REVEIW THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the decisions of the said Tax Court of the United States, in this cause, be, and the same are hereby, reversed; and that this cause be, and the same is hereby, remanded to the Tax Court of the United States for further proceedings not inconsistent with the opinion of the Court filed herein.

/s/ CLEMENT F. HAYNSWORTH, JR.,
United States Circuit Judge.

/s/ ALBERT V. BRYAN,
United States Circuit Judge.

/s/ J. SPENCER BELL,
United States Circuit Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1964